Lee Yin Chuan & Ors v Johan Properties Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-03(IM)-83–07 OF 2014, W-03(IM)-84–07 OF 2014 AND W-03(IM)-98–08 OF 2014

MOHD ZAWAWI SALLEH, ABDUL RAHMAN SEBLI , VERNON ONG JJCA

23 APRIL 2015

Contract — Agreement — Breach — Novation — Three interlocutory appeals stemmed from decisions of judicial commissioner — Whether rights, interests, benefits, liabilities and obligations novated — Whether losses and damages due to alleged breach of contract proven — Whether losses and damages within reasonable contemplation of parties when contract entered into — Whether appeals ought to be allowed

Three interlocutory appeals stemmed from the decisions of the judicial commissioner ('the JC') in the same proceedings, were heard together. Civil Appeal No W-03(IM)-83–07 of 2014 ('Appeal (83)') related to the decision of the senior assistant registrar ('the SAR') dismissing the defendants' application to amend the amended statement of defence (encl 59); Civil Appeal No W-03(IM)-84–07 of 2014 ('Appeal (84)') related to the amount of the damages assessed by the SAR; and Civil Appeal No W-03(IM)-98–08 of 2014 ('Appeal (98)') was the plaintiff's appeal against the decision of the JC in dismissing the plaintiff's appeal (encl 61) against the amount of the damages assessed by the SAR. The plaintiff and the defendants were owners of adjoining lands, namely, Lots 288 and 289. Under an agreement ('the principal agreement'), the defendants agreed to sell Lot 289 to Johan Holdings for RM9.6m. Johan Holdings paid a deposit of RM1.7m to the defendants. By a supplemental agreement, the completion date for the sale was extended to six years. By an undated agreement ('the further supplemental agreement'), payment of the balance purchase price was varied. The defendants and Johan Holdings entered into an agreement ('the new agreement') and it was agreed, inter alia, that: the defendants agreed to accept office space to be constructed by Johan Holdings in lieu of payment of the balance purchase price; the new agreement was conditional upon Johan Holding providing a performance bond of RM9.5m; and the defendants were required to deliver the transfer documents to Johan Holding's solicitors. By a deed of novation ('the novation agreement'), Johan Holdings novated the performance of the new agreement to the plaintiff. Consequently, the plaintiff would perform the new agreement in place of Johan Holdings. The plaintiff delivered the performance bond to the defendants but the defendants failed to deliver the transfer documents to

the plaintiff's solicitors. The High Court dismissed the plaintiff's claim. On appeal, the Court of Appeal found for the plaintiff on the issue of liability. The Court of Appeal held that the defendants were in breach of the new agreement. On Appeal (83), the JC affirmed the SAR's decision in dismissing the defendants' application. On Appeal (84), the learned JC found that the assessment of the items of damages by the SAR was based on a proper consideration and evaluation of the oral and documentary evidence. On Appeal (98), the JC found that the damages awarded by the SAR were based on the oral and documentary evidence. Hence, the present appeals.

Held, dismissing Appeals (83) and (84) with costs; allowing Appeal (98) in part:

(1) The novation agreement which was made at the same time as the new agreement, was predicated upon the understanding the defendants agreed to the novation of Johan Holding's rights, interests, benefits, liabilities and obligations under the previous agreements to the plaintiff. It also followed that the defendants were liable to return the RM1.7m deposit sum paid under the principal agreement to the plaintiff; this point was rightly conceded by the defendants (see para 17).

(2) In order for the plaintiff to succeed in its claim the plaintiff must show that the loss and damage is due to the breach of contract by the defendants. Once that is established, the plaintiff has the additional burden of proving the damages. In other words, it must be shown that the loss and damage was within the reasonable contemplation of the parties at the time they entered into the contract (see para 21).

(3) When the parties entered into the agreements, they would have contemplated that the plaintiff would have to take certain preparatory steps in relation to the land before development of the same can take place. In the circumstances, it was not unreasonable for Johan Holdings and the plaintiff to have incurred the expenses in anticipation and in reliance on the promise made by the defendants in the agreements to sell and transfer Lot 288 to the plaintiff. The decision of the SAR in apportioning the wasted expenses was plainly wrong and ought to be set aside. Accordingly, the JC ought to have set aside the decision of the SAR; the decision of the JC in affirming the SAR's decision on this issue was also set aside (see para 23).

(4) On the legal fees, the SAR failed to take into account the proof of payments made to the said legal firm, in particular the payment vouchers and receipts which were produced. Accordingly, the decision of the SAR and the JC was set aside and the claim for the legal fees was allowed (see para 28).

[Bahasa Malaysia summary

Tiga rayuan interlokutori berpunca daripada keputusan pesuruhjaya kehakiman ('PK') dalam prosiding yang sama, didengar bersama. Rayuan Sivil No W-03(IM)-83–07 tahun 2014 ('Rayuan (83)') berkaitan kepada keputusan timbalan pendaftar kanan ('TPK') menolak permohonan defendan-defendan untuk meminda pernyataan pembelaan yang dipinda (lampiran 59); Rayuan Sivil No W-03(IM)-84–07 tahun 2014 ('Rayuan (84)') berkaitan kepada jumlah ganti rugi yang ditaksir oleh TKP; dan Rayuan Sivil No W-03(IM)-98–08 tahun 2014 ('Rayuan (98)') adalah rayuan plaintif terhadap keputusan PK dalam menolak rayuan plaintif (lampiran 61) terhadap jumlah ganti rugi yang ditaksir oleh TKP. Plaintif dan defendan-defendan adalah pemilik tanah yang bersebelahan, iaitu Lot 288 dan 289. Di bawah perjanjian ('perjanjian utama'), defendan-defendan bersetuju untuk menjual Lot 289 kepada Johan Holdings bagi sebanyak RM9.6 juta. Johan Holdings membayar deposit sebanyak RM1.7 juta kepada defendan-defendan. Melalui perjanjian tambahan, tarikh siap bagi jualan dilanjutkan kepada enam tahun. Melalui perjanjian yang tak bertarikh ('perjanjian tambahan yang dilanjutkan'), bayaran baki harga belian adalah pelbagai. Defendan-defendan dan Johan Holdings memasuki perjanjian ('perjanjian baru') dan ia dipersetujui, antara lain, bahawa: defendan-defendan bersetuju untuk menerima ruang pejabat yang dibina oleh Johan Holdings sebagai ganti bayaran baki harga belian; perjanjian baru adalah dengan syarat Johan Holding memperuntukkan bon pelaksanaan sebanyak RM9.5 juta; dan defendan-defendan dikehendaki untuk menghantar dokumen pindaan kepada peguam Johan Holding. Dengan surat novasi ('perjanjian novasi'), Johan Holdings memberikan pelaksanaan perjanjian baru kepada plaintif. Akibatnya, plaintif akan melaksanakan perjanjian baru menggantikan Johan Holdings. Plaintif memberikan bon pelaksanaan kepada defendan-defendan tetapi defendan-defendan gagal untuk memberikan dokumen pindaan tersebut kepada peguam plaintif. Mahkamah Tinggi menolak tuntutan plaintif. Atas rayuan, Mahkamah Rayuan memihak plaintif atas isu liabiliti. Mahkamah Rayuan memutuskan bahawa defendan-defendan adalah melanggar perjanjian baru. Atas Rayuan (83), PK mengesahkan keputusan TKP dalam menolak permohonan defendan-defendan. Atas Rayuan (84), PK yang bijaksana mendapati bahawa penaksiran perkara ganti rugi oleh TKP adalah berdasarkan atas pertimbangan yang betul dan penilaian keterangan lisan dan dokumentar. Atas Rayuan (98), PK mendapati bahawa ganti rugi yang diawardkan oleh TKP adalah berdasarkan atas keterangan lisan dan dokumentar. Maka rayuan ini.

Diputuskan, menolak Rayuan-Rayuan (83) dan (84) dengan kos; membenarkan sebahagian Rayuan (98):

(1) Perjanjian novasi yang dibuat pada masa sama seperti perjanjian baru, dipercayai atas pemahaman defendan-defendan bersetuju kepada novasi hak, kepentingan, faedah, liabiliti dan tanggungjawab Johan Holdings di

bawah perjanjian sebelumnya kepada plaintif. Ia juga diikuti bahawa defendan-defendan bertanggungjawab untuk memulangkan balik deposit sejumlah RM1.7 juta yang dibayar di bawah perjanjian utama kepada plaintif; perkara ini dengan betul diakui oleh defendan-defendan (lihat perenggan 17).

(2) Untuk plaintif berjaya dalam tuntutannya plaintif mesti menunjukkan bahawa kerugian dan ganti rugi adalah akibat pelanggaran kontrak oleh defendan-defendan. Apabila ianya dibuktikan, plaintif mempunyai beban tambahan membuktikan ganti rugi tersebut. Dengan kata lain, ia mesti ditunjukkan bahawa kerugian dan ganti rugi adalah dalam pandangan munasabah pihak-pihak pada masa mereka memasuki kontrak (lihat perenggan 21).

(3) Apabila pihak-pihak memasuki perjanjian, mereka mungkin akan berfikir bahawa plaintif akan mengambil langkah-langkah persediaan tertentu berkaitan kepada tanah sebelum pembangunan ke atasnya boleh dijalankan. Dalam keadaan tersebut, ia adalah tidak munasabah untuk Johan Holdings dan plaintif untuk menanggung pembelanjaan dalam menjangka dan dalam bergantung atas janji yang dibuat oleh defendan-defendan dalam perjanjian untuk menjual dan meminda Lot 288 kepada plaintif. Keputusan TKP dalam membahagi-bahagikan perbelanjaan membazir adalah jelas salah dan patut diketepikan. Dengan itu, PK patut mengetepikan keputusan YKP; keputusan PK dalam mengesahkan keputusan TKP atas isu ini juga diketepikan (lihat perenggan 23).

(4) Mengenai fi undang-undang, TKP gagal untuk mengambil kira bukti bayaran yang dibuat kepada firma undang-undang tersebut, terutamanya baucer dan resit bayaran yang mana dikemukakan. Oleh itu, keputusan YKP dan PK diketepikan dan tuntutan untuk fi undang-undang dibenarkan (lihat perenggan 28).]

Notes

For cases on breach, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3278–3286.

Cases referred to

Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers [1997] 4 MLJ 532; [1996] 1 LNS 113, HC (refd)

Bonham-Carter v Hyde Park Hotel Ltd 64 TLR 177; [1948] WN 89, KB (refd)

Hadley and another v Baxendale and others [1843-60] All ER Rep 461 (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Ketteman v Hansel Properties Ltd [1987] AC 189, HL (refd)

Kubota Agricultural Machineary Sdn Bhd v Sharizan Sdn Berhad & Anor [2001] MLJU 71; [2001] 6 CLJ 104, HC (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)
PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681, HC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
Tengku Ismail bin Tengku Sulaiman(suing as father of Tengku Iskandar Shah bin Tengku Ismail, deceased) & Ors v Sia Cheng Soon & Anor [2006] 5 MLJ 228, CA (refd)

Legislation referred to

Evidence Act 1950 s 73(A)

Appeal from: Suit No S3–22–383 of 1996 (High Court, Kuala Lumpur).

Joseph Yeo (Joseph Yeo) in Civil Appeal Nos W-03(IM)-83–07 of 2014 and W-03(IM)-84–07 of 2014 for the appellants.
Rishwant Singh (Zul Rafique & Partners) in Civil Appeal No W-03(IM)-98-08 of 2014 for the appellant.
Rishwant Singh (Zul Rafique & Partners) in Civil Appeal Nos W-03(IM)-83–07 of 2014 and W-03(IM)-84–07 of 2014 for the respondent.
Joseph Yeo (Joseph Yeo) in Civil Appeal No W-03(IM)-98–08 of 2014 for the respondents.

Vernon Ong JCA:

INTRODUCTION

[1] In this instance, the three interlocutory appeals relate to decisions of the learned judicial commissioner ('the JC') in the same proceedings. Accordingly, the appeals were all heard together. In this judgment, the parties shall be referred to as they were in the court below.

[2] Civil Appeal No W-03(IM)-83–07 of 2014 ('Appeal (83)') relates to the decision of the senior assistant registrar ('the SAR') dismissing the defendants' application to amend the amended statement of defence (encl 59). This is the defendants' appeal against the decision of the learned JC in dismissing the defendants' appeal against the decision of the SAR.

[3] Civil Appeal No W-03(IM)-84–07 of 2014 ('Appeal (84)') relates to the amount of the damages assessed by the senior assistant registrar. This is the defendants' appeal (encl 60) against the decision of the learned JC in dismissing the defendants' appeal against decision of the SAR.

[4] Civil Appeal No W-03(IM)-98–08 of 2014 ('Appeal (98)') is the plaintiff's appeal against the decision of the learned JC in dismissing the plaintiff's appeal (encl 61) against the amount of the damages assessed by the senior assistant registrar.

SALIENT BACKGROUND FACTS

[5] The brief salient facts pertinent to the determination of the appeals are as follows:

(a) the defendants are the owners of land known as Lot 289. The plaintiff was the owner of land known as Lot 288. Lots 288 and 289 are adjoining lots of land;

(b) under an agreement dated 23 June 1983 ('the principal agreement'), the defendants agreed to sell Lot 289 to Johan Holdings for RM9.6m. Johan Holdings paid a deposit of RM1.7m to the defendants. By a supplemental agreement ('the supplemental agreement') of even date, the completion date for the sale was extended to 6 [bd] years;

(c) by an undated agreement ('the further supplemental agreement'), payment of the balance purchase price was varied whereby in lieu of monetary payment, the defendants agreed to take up office space of equivalent value in the office complex to be developed by Johan Holdings on Lot 289;

(d) on 30 December 1991, the defendants and Johan Holdings entered into an agreement ('the new agreement') whereby it was agreed inter alia that: (i) the defendants agreed to accept office space to be constructed by Johan Holdings in lieu of payment of the balance purchase price, (ii) the new agreement is conditional upon Johan Holding providing a performance bond of RM9.5m, and (iii) the defendants were required to deliver the transfer documents to Johan Holding's solicitors;

(e) by a deed of novation dated 30 December 1991 ('the novation agreement'), Johan Holdings novated the performance of the new agreement to the plaintiff. Consequently, the plaintiff would perform the new agreement in place of Johan Holdings;

(f) the plaintiff delivered the performance bond to the defendants on 23 February 1996;

(g) the defendants failed to deliver the transfer documents to the plaintiff's solicitors; and

(h) the High Court dismissed the plaintiff's claim. On appeal, the Court of Appeal found for the plaintiff on the issue of liability. The Court of Appeal held that the defendants were in breach of the new agreement.

FINDINGS OF THE HIGH COURT

[6] On Appeal (83), the learned JC affirmed the SAR's decision in dismissing the defendants' application to amend the amended statement of defence on two main grounds. The first relates to the delay of about ten years in making the application. The application was only made after the issue of liability had already been determined at trial in 2003. Further, the defendants' application was made after the assessment of damages and only after the defendants received the plaintiff's submission on the said assessment of damages. Secondly, the defendants did not give any explanation for the inordinate delay in filing their application in their affidavit in support (*Ketteman v Hansel Properties Ltd* [1987] AC 189). The learned JC also cited *Tengku Ismail bin Tengku Sulaiman (suing as father of Tengku Iskandar Shah bin Tengku Ismail, deceased) & Ors v Sia Cheng Soon & Anor* [2006] 5 MLJ 228 in support of the principle that a defendant who fails to plead a limitation defence, and allowed a case to proceed to be fought on the merits, is not to be permitted to fall back upon a plea of limitation as a second line of defence at the conclusion of the trial.

[7] On Appeal (84), the learned JC found that the assessment of the items of damages by the SAR was based on a proper consideration and evaluation of the oral and documentary evidence produced by the plaintiff. There was no justification for the High Court to disturb the decision of the SAR.

[8] On Appeal (98), the learned JC found that the damages awarded by the SAR were based on the oral and documentary evidence. The learned JC also found dismissed the plaintiff's claim for: (a) the legal fees of RM254,985.84 and cost of preliminary works. (b) general damages and (c) costs on the assessment on the ground that the plaintiff failed to produce the supporting documents to prove the damages.

SUBMISSION OF PARTIES

[9] On Appeal (83), apart from conceding that the application to amend the amended statement of defence was filed late, learned counsel for the defendants did not strenuously canvass the appeal on this issue.

[10] On Appeal (84), learned counsel for the defendants intimated to the court that the defendants will not be contesting the order on the refund of the deposit of RM1.7m; adding that the defendants are prepared to refund the deposit to the plaintiff and pay the quit rent and assessment sum of RM2,841.

[11] As for the other claims which were allowed by the SAR and which is the subject of both Appeals (84) and (98), learned counsel for the defendants

canvassed two main grounds. First, the defendants cannot be liable for the costs incurred by the plaintiff because the agreements entered into by the parties were in the nature of a sale and purchase agreement and not a joint venture to develop the land. Secondly, the bulk of the claims relate to losses that were incurred by the plaintiff prior to the plaintiff becoming a party pursuant to the novation agreement and the new agreement both dated 30 December 1991. Learned counsel argued that even though there was a continuous relationship between the parties there was no continuous agreement. The plaintiff only came into the picture in 1991. Therefore, the plaintiff is not entitled to claim for expenses incurred by Johan Holdings prior to 1991. Johan Holdings is not claiming for the expenses. There was no assignment of the expenses under the novation agreement. Further, the new agreement only came into effect upon the delivery of the performance bond by the plaintiff on 23 February 1996. As the new agreement supersedes the earlier agreements, it was contended that the plaintiff's claim for wasted expenditure must be limited that incurred under the new agreement.

[12] In contrast, the plaintiff's stand is that insofar as the SAR's decision in relation to the allowed claims is concerned, the SAR arrived at the correct decision. However, the SAR and the learned JC were wrong in apportioning the expenses that the plaintiff incurred to be shared equally by both parties, disallowing the plaintiff's claims for costs of preliminary works and payments made to Messrs Weng Kwai & Co, and in not granting general damages and costs in favour of the plaintiff.

DECISION

[13] Appeals (84) and (98) relate to the following claims that were allowed by the SAR.

Items of damages allowed by SAR

(a) Return of deposit of RM1.7m;

(b) Inspection and valuation fees to Khong & Jaafar of RM9,975;

(c) Architect's fees:

3D International:	RM1,000;
BEP Architect:	RM12,500;
Akitek MAA:	RM897,230.50

(d) Office market study & valuation report:

Knight Frank Ballieu:	RM17,837.50;
Colliers Jordan Lee & Jaafar:	RM3,775

(e) Soil investigation & related works:

Sealand Drillers:	RM8,485;
Juruukur Perubnding Sdn Bhd:	RM1,000;
Hussein & KH Chong Sdn Bhd:	RM25,000;
Pembinaan Hup Tai Sdn Bhd:	RM2,841

(f) Quit rent & assessment: RM2,841;

(g) Charges in relation to various applications made to authorities:

Planning fees to Bendahari Bandaraya:	RM23,655;
Site inspection:	RM250;
Earthwork submissions:	RM1,859.35;
Earthwork fees:	RM367;
Hoarding permit:	RM100;
Processing fees:	RM1,221

(h) Legal fees:

Mah Kok & Din:	RM19,545.84;
PM Tan:	RM49,942.40;
Shearn Delamore:	RM9,816.17.

[14] The first point to address relates to the question of whether the new agreement supersedes the earlier agreements between the parties. We observe that cl 20 of the new agreement provides that the new agreement 'embodies all the terms and conditions agreed the parties as to the subject matter of this agreement and supersedes and cancels in all respect all previous letters of intent, memoranda of agreement, correspondence, undertakings, and agreements (including the said agreements) between them with respect to the subject matter hereof whether such be written or oral'.

[15] However, notwithstanding cl 20, we note that the Court of Appeal did not disturb the High Court's finding of fact that the new agreement was a continuation of the previous agreements. The High Court also found that the plaintiff had appointed consultants pursuant to the previous agreements. More significantly, according to the judgment of the High Court, the approvals for the development from the authorities would have been undertaken under the previous agreements. The drawings and building plans would also have been prepared under the previous agreements and the plaintiff only needs to revise the plans and drawings or renew or extend the approvals.

[16] Consequent on the Court of Appeal's finding that the defendants were in breach of the new agreement, it follows that the plaintiff is entitled to recover

general and special damages arising from the wrongful repudiation of the new agreement pursuant to paras 13 and 16(a) of the re-amended statement of claim.

[17] In our considered view, the novation agreement which was made at the same time as the new agreement, was predicated upon the understanding the defendants agreed to the novation of Johan Holding's rights, interests, benefits, liabilities and obligations under the previous agreements to the plaintiff (see para (10) of the recital of the new agreement). It also follows that the defendants are liable to return the RM1.7m deposit sum paid under the principal agreement to the plaintiff; this point was rightly conceded by learned counsel for the defendants.

[18] For the foregoing reasons, we do not accept the defendant's argument that the new agreement supersedes the previous agreements so as to preclude the plaintiff from recovering the wasted expenditure incurred by Johan Holdings prior to the new agreement.

[19] We will now address the defendants' and plaintiff's appeals on the claims which were allowed by the SAR.

[20] As a preliminary point, we will consider whether the wasted expenditure should have been apportioned. The SAR only awarded 50% of the total amount expended on items (b), (c), (d), (e) and (g) particularised in para 13 above. The SAR justified the apportionment on the following basis:

> Mahkamah mengambilkira perjanjian usaha sama adalah di antara hartanah milik Plaintif serta Defendan iaitu Lot 288 dan Lot 289. Setiap kos yang dibelanjakan adalah bagi kedua-dua hartanah ini. Mahkamah berpuashati dengan hujahan Defendan-defendan bahawa kos tersebut harus dibahagikan di antara Plaintif dan Defendan-defendan.

[21] It is a settled principle of law that in order for the plaintiff to succeed in its claim the plaintiff must show that the loss and damage is due to the breach of contract by the defendants. Once that is established, the plaintiff has the additional burden of proving the damages. In other words, it must be shown that the loss and damage was within the reasonable contemplation of the parties at the time they entered into the contract (see *Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2006) Vol 1 at para 26–032; *Hadley and another v Baxendale and others* [1843-60] All ER Rep 461, at p 465).

[22] The law on the recovery of damages has been succinctly enunciated by Ramly Ali J (now FCA) in *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 at p 697. It may be summarised as follows:

(a) the burden of proof is on the party seeking the claim to prove the facts and the amount of damages (*Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 (CA); *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177; [1948] WN 89; *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA)); and

(b) the damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusions will not suffice (*Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 (CA)).

[23] We agree with the submission of learned counsel for the plaintiff that on the facts as found by the High Court, when the parties entered into the agreements, they would have contemplated that the plaintiff would have to take certain preparatory steps in relation to the land before development of the same can take place. In the circumstances, it is not unreasonable for Johan Holdings and the plaintiff to have incurred the expenses in anticipation and in reliance on the promise made by the defendants in the agreements to sell and transfer Lot 288 to the plaintiff. We are constrained to hold that the decision of the SAR in apportioning the wasted expenses is plainly wrong and ought to be set aside. Accordingly, the learned JC ought to have set aside the decision of the SAR; we therefore also set aside learned JC decision in affirming the SAR's decision on this issue.

[24] We will now deal with the various claims which form the bone of contention between the parties.

[25] Item (b) relates to inspection and valuation fees of RM19,950. In this instance, the plaintiff's witness PW2 produced the original invoices and payment vouchers in support of the claim. However, the maker of the invoice was not called. We find that the SAR's decision in admitting the documents is consistent with the fact and in law. The SAR took into account the fact that the events took place in 1984 and that the maker's attendance cannot be procured without any amount of delay and expense (s 73(A) of the Evidence Act 1950). Further, PW2 who tendered the documents had personal knowledge of the details of the payment because he compiled the relevant documents when the plaintiff filed the suit in 1996 (*Kubota Agricultural Machineary Sdn Bhd v Sharizan Sdn Berhad & Anor* [2001] MLJU 71; [2001] 6 CLJ 104 at p 105; *Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers* [1997] 4 MLJ 532; [1996] 1 LNS 113).

[26] According to the appeal record, in addition to the oral evidence of witnesses called by the plaintiff, the relevant invoices payment vouchers and receipts have also been produced in support of the claims regarding items (c),

(d), (e), (g) and (h). In all the circumstances, we are not persuaded that appellate intervention is warranted as the decisions of the SAR and the learned JC were not grounded on any error in law or in fact.

[27] The plaintiff is also appealing against the SAR's decision in disallowing the claims for (a) the sum of RM1,532 and RM405 being legal fees paid to Messrs Weng Kwai & Co; (b) the cost of funds for preliminary works of RM1,854,892.82; and (c) general damages and costs.

[28] On the legal fees, we agree with the submission of learned counsel for the plaintiff that the SAR failed to take into account the proof of payments made to the said legal firm referred to by PW2, in particular the payment vouchers and receipts which were produced. Accordingly, we set aside the decision of the SAR and the learned JC and allow the claim for the legal fees paid to Messrs Weng Kwai & Co.

[29] According to the appeal record, the plaintiff called two witnesses (PW2 and PW3) to prove their claim for the cost of funds for preliminary works. The plaintiff did not have the financial capability to execute the preliminary works and had to obtain loans from its holding company, Johan Holdings, a public listed company. Whilst there is no special resolution for the loan transactions, it is not disputed that the plaintiff is a 100% subsidiary of Johan Holdings and both entities have common management. The loan transactions are reflected in the plaintiff's annual report and accounts and they appear to account for the interest charges for the loans obtained by the plaintiff. PW2 gave evidence on how the interest charge was calculated. PW2 alluded to the payments made by the plaintiff to Johan Holdings towards the interest charges. We are inclined to agree with the submission of learned counsel for the plaintiff that the SAR failed to appreciate the pertinent fact that the annual reports and accounts were prepared by an independent auditor who is an independent party. Accordingly, we would set aside the decision of the SAR and the learned JC and allow the plaintiff's claim for the cost of funds for the preliminary works.

[30] Insofar as the plaintiff's claim for general damages is concerned, we are not persuaded that the SAR and learned JC erred in dismissing the claim. No evidence was produced to support the claim for general damages. Accordingly, the plaintiff's argument is without merit.

CONCLUSION

[31] For the foregoing reasons, Appeal (83) is dismissed with costs of RM1,000.

[32] Appeal (84) is also dismissed with costs.

[33] Appeal (98) is allowed in part. The plaintiff's claim for general damages and costs is dismissed. The plaintiff's claim for the cost of funds for preliminary works and legal fees paid to Messrs Weng Kwai & Co is allowed. The decision of the SAR and the learned JC on the apportionment of the expenses and costs incurred by the plaintiff is set aside.

[34] We award costs of RM20,000 for Appeals (84) and (98).

Appeals (83) and (84) dismissed with costs; Appeal (98) allowed in part.

Reported by Afiq Mohamad